

JUN 9 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6111
DATE COMPLAINT FILED October 27, 2008
DATE SUPPLEMENT FILED January 6, 2009
DATE OF NOTIFICATION November 3, 2008
DATE OF NOTIFICATION
OF SUPPLEMENT January 9, 2009
DATE OF LAST RESPONSE December 19, 2008
DATE ACTIVATED March 11, 2009

EXPIRATION OF SOL October 30, 2013

COMPLAINANT:

Bill Buckel

RESPONDENTS:

WOSU Public Media
Columbus Metropolitan Club

**RELEVANT STATUTES
AND REGULATIONS:**

2 U S C § 431(9)(B)(u)
2 U S C § 441b(a)
11 C F R § 100 92
11 C F R § 100 154
11 C F R § 110 13
11 C F R § 114 4

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

The complainant in this matter alleges that WOSU Public Media ("WOSU") and the Columbus Metropolitan Club ("CMC") acted as "political action groups" when they cosponsored a debate on October 16, 2008 featuring three candidates for Ohio's 15th District U S Representative seat, but excluded Libertarian candidate Mark Noble The Complainant suggests that the debate was tantamount to a financial contribution to, or an expenditure on behalf of, the

1 participating candidates because the debate gave them "preferential exposure," and asserts that
2 WOSU and CMC "should be required to [register with the Commission] and file the required
3 forms " Further, the Complainant maintains that the participating candidates should report the
4 alleged in-kind contribution in disclosure reports filed with the Commission The Commission
5 received a supplement to the original complaint on January 6, 2009 raising "new facts"
6 supporting the original allegations, including that WOSU broadcast a radio "call-in show" on
7 October 30, 2008 with the same three candidates that participated in the debate The supplement
8 also noted that Mr Noble polled over 10,000 votes in the general election demonstrating that he
9 was a serious candidate

10 In its response to the original complaint, CMC maintains that it did not violate the
11 Federal Election Campaign Act of 1971, as amended, ("the Act") by excluding Noble from the
12 debate Specifically, CMC contends that as a tax exempt organization under Section 501(c)(3) of
13 the Internal Revenue Code, it is legally permitted to stage candidate debates in accordance with
14 the requirements of 11 C F R § 110.13 CMC claims it adhered to these requirements because
15 the participating candidates were chosen by its cosponsor, WOSU, who utilized "pre-established
16 objective eligibility criteria" to determine which candidates "demonstrated a measurable chance
17 of election to the office they [sought]" and would thereby be invited to participate in the debate
18 CMC Response at 2-3 CMC attached the criteria used by WOSU to its response See CMC
19 Response, Exhibit A In addition, CMC maintains that because the debate was a "nonpartisan
20 activity designed to encourage individuals to vote or to register to vote" it is exempt from the
21 Act's definition of a "contribution" or "expenditure " 2 U S C § 431(9)(B)(ii), CMC Response
22 at 3 CMC also notes that each year it hosts numerous forums and debates, and that in planning
23 and hosting all events it strives to remain completely neutral and does not advertise, promote,

10044263219

endorse, oppose, or advocate any person, candidate, position or ideology CMC did not submit a response to the complaint supplement alleging that the October 30, 2008 radio program also resulted in a contribution or expenditure However, it appears that CMC had no role in the radio program

Respondent WOSU also argues that it acted legally because it determined eligibility for participation in the debate based upon objective criteria outlined in a predetermined policy, and explained that Noble was not invited to participate because he did not meet those criteria WOSU submitted a copy of its debate guidelines regarding the inclusion of third-party candidates in political debates to demonstrate that its eligibility criteria are based on indicators of electoral support and are viewpoint neutral WOSU explains that the guidelines seek to ensure that voters "see and hear as much as possible from candidates who have a legitimate chance of being elected " WOSU Response at 4 The selection criteria require that a candidate is (1) a legally qualified candidate that has publicly announced his/her intention to run for the office and qualified for the ballot, or actively campaigning as a write-in candidate (demonstrated by having a staffed campaign headquarters and receiving press coverage), and (2) has received at least five percent or more of support in a professionally conducted public opinion survey by an independent pollster WOSU Response, Attachment A, *see also* CMC Response, Exhibit A and

10044263220

Complaint, Attachment A¹ WOSU noted that Mr. Noble did not reach the 5% polling threshold and thus was not invited on that basis. However, WOSU also points out that one third party candidate met the 5% requirement and participated in the debate.

Like CMC, WOSU submitted no additional response when provided with a copy of the Complaint supplement alleging that the October 30, 2008 radio program also resulted in expenditures. However, according to the Complainant, when a caller asked why Noble was excluded from the radio show during the show itself, the host read WOSU's policy regarding candidate debate selection to explain how the call-in show's guest list was derived.

Based on all available information, we recommend that the Commission find no reason to believe that CMC or WOSU violated the Act by making prohibited contributions to, or expenditures on behalf of the candidates participating in the debate in question, or by failing to register with the Commission and file disclosure reports, and close the file as to both

Respondents.

II. FACTUAL AND LEGAL ANALYSIS

In anticipation of the November 4, 2008, general election, WOSU and CMC entered into an agreement to cosponsor a debate featuring candidates vying for Ohio's 15th District U.S. Representative seat. Under the agreement, CMC was to promote attendance, gather

¹ The selection criteria submitted by WOSU in its response is slightly different from that submitted by CMC even though CMC purports to be submitting WOSU's policy. For instance, CMC lists submission of campaign finance reports filed with a government agency as an objective criterion to measure candidate viability, while WOSU does not. Nevertheless, it appears that the minor differences between the criteria submitted by each are not material in our analysis here. In addition, the criteria submitted by both WOSU and CMC appear to apply only to third party candidates. It is not clear whether there are separate criteria for major party candidates that were not submitted to the Commission or whether there are no selection criteria for major party candidates and they are automatically invited to the debate. For general election debates, staging organizations cannot use nomination by a particular party as the sole objective criterion to determine debate eligibility. See 11 C.F.R. § 110.13(c). Nevertheless, information in the complaint responses indicates that the major party candidates met the selection criteria used for third party candidates (e.g., 5% polling threshold, ballot access). For instance, at the time of the debate, the two major party candidates had polled 47% and 42%, respectively, in public support. See CMC Response, Exhibit B.

1 reservations, help with set design and collect and screen questions to be asked at the debate
2 WOSU was to choose the participating candidates and to host and broadcast the debate

3 WOSU invited three candidates to participate in the debate on October 16, 2008 In
4 addition, the same candidates participated in a WOSU Radio open line call-in show on October
5 30, 2008 It appears that the participating candidates for each of these events were chosen
6 pursuant to WOSU's policy regarding political debates, implemented in March 2008
7 According to WOSU's debate policy, candidates demonstrating a measurable chance of
8 election, defined as those receiving at least five percent support in a poll or public opinion
9 survey conducted by an independent organization, would be included Candidates not
10 receiving the requisite support would be excluded because, according to the policy, "such
11 participation will hinder the audience's understanding of the positions held by candidates who
12 have a legitimate chance of winning election (sic) " WOSU Response at 2

13 On October 8, 2008, Mr Buckel, the complainant in this matter, phoned WOSU
14 regarding Noble's exclusion from the scheduled debate WOSU explained that Noble had been
15 excluded because he had failed to receive the requisite five percent support It also provided a
16 copy of its policy regarding political debates in a letter sent to Mr Buckel the same day
17 Subsequently, Mr Buckel filed his complaint with the Commission

18 **A. The Columbus Metropolitan Club Did Not Violate the Act**

19 The CMC is incorporated in the state of Ohio and is a 501(c)(3) non-profit organization
20 The Act prohibits "any corporation whatever" from making contributions or expenditures in
21 connection with federal elections 2 U S C § 441b(a) However, 2 U S C § 431(9)(B)(ii)
22 exempts from the definition of "expenditure" "nonpartisan activity designed to encourage
23 individuals to vote or register to vote " The regulation implementing the statutory exemption

10044263222

1 includes "funds provided to defray costs incurred in staging candidate debates in accordance
2 with the provisions of 11 C F R §§ 110 13 and 114 4(f)" within the exemption See 11 C F R
3 §§ 100 92 and 100 154 Section 110 13(a)(1), in turn, permits "[n]onprofit organizations
4 described in 26 U S C §§ 501(c)(3) or (c)(4) and which do not endorse, support, or oppose
5 political candidates or political parties" to "stage candidate debates in accordance with this
6 section and 11 C F R § 114 4(f) "

7 The regulations leave the structure of the debate to the discretion of the staging
8 organization, provided that the debate includes at least two candidates, the organization does not
9 arrange the debates in a manner that promotes or advances one candidate over another, and the
10 criteria for candidate selection are objective and pre-established, under 11 C F R § 110 13(b)
11 and (c) For general election debates, staging organizations shall not use nomination by a
12 particular party as the sole objective criterion to determine debate eligibility 11 C F R
13 § 110 13(c) In its *Explanation and Justification for Corporate and Labor Activity*, the
14 Commission stated that section 110 13 does not require that candidate selection criteria be
15 reduced to writing or be made available to all candidates 60 Fed Reg 64260-64262 (December
16 14, 1995) In past "debate" MURs, the Commission has considered a number of different criteria
17 to have been acceptably "objective," including percentage of votes received by a candidate in a
18 previous election, the level of campaign activity by the candidate, his or her fundraising ability
19 and/or standing in the polls, and eligibility for ballot access See MURs 4956, 4962, and 4963
20 (Gore 2000, *et al*), MUR 5395 (Dow Jones, *et al*), and MUR 5650 (University of Arizona)

21 In this matter, CMC, a 501(c)(3) non-profit organization, complied with the requirements
22 of 11 C F R § 110 13 when it cosponsored the debate in question The debate featured three
23 candidates, all of which purportedly met predetermined criteria for candidate selection The

10044263223

1 criteria for candidate selection appear objective, requiring that participating candidates be legally
2 qualified to hold the office for which they are campaigning, have achieved ballot access or
3 actively campaigning as a write-in candidate, and receive five percent or more of support in a
4 professionally conducted independent poll or survey CMC provided information indicating that
5 just prior to the debate Noble had the support of approximately two percent of voters, according
6 to a poll conducted by SurveyUSA on behalf of a local television network The complainant
7 does not dispute the results of the poll, or claim that Noble was otherwise eligible to participate
8 in the debate pursuant to the criteria set forth by WOSU Finally, the Complainant did not
9 allege, nor is there information to suggest that the structure of the debate promoted or advanced
10 one candidate over another In fact, the organization's published mission is to "promote the open
11 exchange of information and ideas among the residents of Central Ohio" in a non-partisan
12 manner and to "provide a platform for the discussion of social, political, economic and cultural
13 issues of concern to the community "
14 <http://www.columbusmetroclub.org/Default.aspx?pageId=49310>, last viewed May 8, 2009 To
15 this end, the organization organizes 60-70 events per year, billed as "forums and debates," to
16 promote "diversity, discussion and debate " *Id* There is no available information to suggest that
17 the organization endorses, supports, or opposes any political candidates or political parties In
18 fact, most CMC forums and debates involve social topics unrelated to political candidates or
19 political parties

20 Accordingly, because the Columbus Metropolitan Club is a 501(c)(3) non-profit
21 organization and complied with the requirements of provisions 11 C F R § 110.13 when it
22 hosted the debate, we recommend that the Commission find no reason to believe that CMC
23 violated the Act by failing to register with the Commission and file disclosure reports or by

10044263224

making prohibited and unreported contributions to, or expenditures on behalf of, the candidates participating in the debate

B. WOSU Public Media Did Not Violate the Act

1. Debate

The Commission's regulations provide that "[b]roadcasters (including a cable television operator, programmer, or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with [section 110 13] and 11 C F R § 114 4(f), provided they are not owned by or controlled by a political party, political committee or candidate " 11 C F R § 110 13(a)(2) In its Response, WOSU explains that Ohio State University owns and operates WOSU, and as an instrumentality of the State of Ohio, it is not controlled by any candidate, political party or political committee The organization operates a public radio and television station in Columbus, Ohio, and is a member station of the Public Broadcasting System (PBS) Thus, as a broadcaster, WOSU may sponsor candidate debates pursuant to section 110 13(a)(2) without making a contribution or expenditure to the extent that it complies with the rules in sections 110 13(b) and (c) See MUR 6072 (Northland Regional Chamber of Commerce, *et al*) At the debate in question, it appears that WOSU complied with the Commission's debate staging criteria at 11 C F R § 110 13(b) and (c) by including at least two candidates and not promoting one of them over the other, and by selecting debate participants based on pre-established, objective criteria

Accordingly, because WOSU complied with the requirements at 11 C F R § 110 13, we recommend that the Commission find no reason to believe that WOSU Public Media violated the Act by failing to register with the Commission and file disclosure reports or by making

10044263225

prohibited and unreported contributions to, or expenditures on behalf of, the candidates participating in the debate

2. Radio Call-in Show

The Act defines "contribution" and "expenditure" to include any gift of money or "anything of value" made for the purpose of influencing any election for Federal office, but excludes any cost "incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer, or producer), unless the facility is owned or controlled by any political party, political committee, or candidate " 2 U S C § 431(8)(A)(i), (9)(A)(i), and (9)(B)(i), 11 C F R §§ 100 52, 100 73, 100 111(a), and 100 132 This exclusion is known as the "press exemption " or "media exemption " The term "anything of value" includes in-kind contributions 11 C F R § 100 52(d)(1)

In applying the press exemption, the Commission first asks whether the entity engaging in the activity is a "press entity" within the meaning of the Act and the Commission's regulations In determining whether an entity is a press entity, the Commission has focused on whether it is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials See Advisory Opinions 2008-14 (Melothe, Inc), 2007-20 (XM Satellite Radio Inc), and 2005-19 (The Inside Track) Second, the Commission, in determining the exemption's scope, asks (a) whether the press entity is owned or controlled by a political party, committee, or candidate, and, if not, (b) whether the entity was functioning within the scope of a legitimate press entity at the time of the alleged violation If the press entity is independent of any political party, committee, or candidate, and if it was acting as a legitimate press entity at the time of the alleged violation, it is exempt from the Act's restrictions on

10044263226

1 corporate contributions and expenditures, and the Commission's inquiry should end. See
2 *Reader's Digest Association v FEC*, 509 F Supp 1210, 1215 (S D N Y 1981), *FEC v Phillips*
3 *Publishing*, 517 F Supp 1308, 1312-13 (D D C 1981), Advisory Opinions 2008-14 (Melothe,
4 Inc), 2005-19 (The Inside Track), and 2005-16 (Fired Up!)

5 The complainant seems to suggest that the radio call-in show was another debate
6 featuring the same candidates that participated in the previously televised debate and that, once
7 again, WOSU wrongfully excluded Noble from this debate. According to the complaint, the host
8 of the radio program even cited the WOSU debate selection criteria during the radio broadcast in
9 response to a question concerning Noble's exclusion from the program. Notwithstanding
10 whether this was a "debate," it appears that the radio show was a press activity and is therefore
11 exempt from the definition of expenditure or contribution by the "press exemption."

12 WOSU Radio is a press entity because it regularly produces and airs news stories and talk
13 shows. In addition to local programming such as the debate in this matter, WOSU airs numerous
14 national news and public affairs programs including "On Point," "On the Media," "Talk of the
15 Nation," and "Weekend Edition." <http://www.wosu.org/radio/> (last viewed June 9, 2009)
16 Further, WOSU specifically denies that it is owned or controlled by any political party, political
17 committee, or candidate, and neither the complaint nor the available evidence suggests
18 otherwise. Finally, the October 30, 2008 radio call-in show constituted legitimate press activity.
19 It featured political candidates which answered questions from listeners regarding the
20 candidates' positions regarding issues of local importance. The fact that the program featured
21 political candidates is not dispositive, because featuring interviews of candidates on-air falls
22 within the bounds of the press exemption. See, e.g., MUR 5569 (John and Ken Show)

10044263227

Accordingly, because the alleged activity in this matter falls within the press exemption, we recommend that the Commission find no reason to believe that WOSU Public Media violated the Federal Election Campaign Act of 1971, as amended, by making prohibited and unreported contributions to, or expenditures on behalf of, the candidates participating in the radio call-in show, and close the file

III. RECOMMENDATIONS

- 1 Find no reason to believe that the Columbus Metropolitan Club violated the Federal Election Campaign Act of 1971, as amended,
- 2 Find no reason to believe that WOSU Public Media violated the Federal Election Campaign Act of 1971, as amended,
- 3 Approve the attached Factual and Legal Analyses,
- 4 Approve the appropriate letters, and
- 5 Close the file

Thomasenia P. Duncan
General Counsel

6-9-09
Date

BY K. H. Guith
Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement

Peter G. Blumberg
Peter G. Blumberg
Assistant General Counsel

Wanda D. Brown
Wanda D. Brown
Attorney

1
2
3
4

10044263229